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IN THE

Supreme Court of the United States

OCTOBER TERM, 2005

GOKHAN UNAL

Petitioner,

v.

FERIDE ELA AKINCI-UNAL

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process Clause allow a State's courts to exercise personal jurisdiction over a nonresident in property claims by his former spouse which arise from their separation in another country and which are filed years after they had jointly left the State while still married, simply because at one time they had lived there as a married couple?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gokhan Unal ("petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Appeals Court in this case.

OPINIONS BELOW

The order of the Supreme Judicial Court declining discretionary further appellate review [App., *infra* at 13a] is unreported, but is referenced in a table at 445 Mass. 1106, 838 N.E.2d 576 (2005). The opinion and judgment of the Massachusetts Appeals Court [*infra* at 1a] is reported at 64 Mass.App.Ct. 212, 832 N.E. 2d 1 (2005). The opinion and judgment of the Massachusetts Probate and Family Court [*infra* at 14a] is unreported.

JURISDICTION

The Massachusetts Appeals Court entered its judgment on August 8, 2005, deciding the federal question.

An application for discretionary further appellate review was filed on October 14, 2005, pursuant to an order allowing such filing by the Supreme Judicial Court. On November 30, 2005, that court issued an order declining to review the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) with respect to a judgment of the Massachusetts Appeals Court as to which the Supreme Judicial Court declined to exercise its power of review.

STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, sec. 1, provides in pertinent part as follows:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;...

M.G.L. c. 223A, § 3 provides in pertinent part as follows:

...A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's...

(g) maintaining a domicile in this commonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, parentage of a child, child support or child custody; or the commission of any act giving rise to such a claim;...

STATEMENT OF THE CASE

Petitioner seeks review by this Court because the Massachusetts Appeals Court has held that Massachusetts may assert jurisdiction over him in property claims brought by his former wife several years after they left Massachusetts together in 1994 while still married. The Massachusetts court has ruled that the Fourteenth Amendment's Due Process Clause is satisfied solely because the parties lived at one time in Massachusetts as a married couple. As it did in *Kulko v. Superior Court of California*, 436 U.S. 84 (1978), *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), this Court should exercise jurisdiction over the Appeals Court's decision that petitioner must litigate these claims in a Massachusetts court.

A. *Facts*

Petitioner and respondent Feride Ela Akinci-Unal ("respondent") were married in Turkey, their homeland, in December, 1987. In 1988, the couple moved to Massachusetts so that petitioner could attend business school and become employed in the financial services industry. They were married in a civil ceremony in Massachusetts in February, 1988. Subsequently, respondent returned to Turkey on four separate occasions for extended periods, although the parties remained married [*infra* at 2a-3a]. In 1994, petitioner moved to Bahrain, where he had been transferred by his employer, and took up permanent residence. Respondent joined him in Bahrain in 1994. The marriage was childless and there is no evidence of any marital real estate in Massachusetts [*Id.*]. As the Probate and Family Court found, the couple lived together in Bahrain sporadically, with respondent returning to her family in Turkey on occasions when petitioner was on business trips, but respondent left Bahrain permanently in October, 1996 [*infra* at 14a-15a]. Although respondent was unclear about where she was

domiciled after 1996, she admitted that she "'went back to Turkey first and ... eventually went back to the United States'" [*infra* at 3a n. 1]. Petitioner provided undisputed evidence that she was residing in Turkey until July, 1997, when he commenced divorce proceedings there, and that respondent then moved to the United States [*Id.*].[1] In response to petitioner's divorce filing in Turkey, respondent brought an action for separate support in the Massachusetts Probate and Family Court in October, 1997 [*infra* at 3a].[2] Petitioner commenced a second divorce action, this time in Bahrain, and obtained a divorce in March, 1998. The Bahrainian judgment expressly preserved respondent's rights arising from the divorce [*infra* at 3a-4a]. Because the parties no longer were married, the Massachusetts court dismissed respondent's action for separate support in July, 1999 [*infra* at 4a].

On September 22, 1999, respondent filed the action in the Massachusetts court for alimony and property division which is the subject of this petition [*infra* at 15a]. Meanwhile, petitioner's action in Turkey went forward. Respondent was represented by counsel and the Turkish court granted a divorce in June, 2000, again explicitly preserving respondent's rights to compensation or maintenance [*infra* at 4a]. Unable to serve petitioner in Massachusetts, respondent finally obtained leave from the Massachusetts court for alternative service in November, 2002 [*Id.*].

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[1] The Appeals Court ruled that respondent had the burden of "establishing facts sufficient to justify [the] exercise" of jurisdiction [*infra* at 5a]. To the extent it was relevant, she failed to pin down exactly when she returned to Massachusetts. Petitioner's evidence on this point, as noted, was not refuted.

[2] Respondent served petitioner personally when he visited Massachusetts in January, 1998 to meet with his employer [*infra* at 3a n. 2].

B. *Course of Proceedings*

In the Probate and Family Court, petitioner filed a timely special appearance and a motion to dismiss which asserted defenses, including that the exercise of personal jurisdiction by the court under the relevant provision of the Massachusetts Long Arm Statute, M.G.L. c. 223A, § 3(g), would violate his Fourteenth Amendment due process right because he lacks the requisite "minimum contacts" with Massachusetts as required under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) [State App. 48-61][3]. After a hearing, the Massachusetts court issued an order allowing petitioner's motion and dismissing respondent's action in June, 2003. The court relied on several grounds. Pertinent here, it concluded that § 3(g) does not confer jurisdiction because respondent's claim relies on no conduct by petitioner which occurred while they lived in Massachusetts and because, in any event, the exercise of personal jurisdiction would offend the basic requirements of due process set forth in *International Shoe Co. v. Washington*, 326 U.S. at 319-20 [*infra* at 20a-22a]. Respondent appealed.

On appeal, the Massachusetts Appeals Court reversed and held that respondent's claims against petitioner can go forward in the Massachusetts Court. It applied the two-step analysis mandated by *Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 5-6, 389 N.E.2d 76, 79 (1979), which holds that the Long Arm Statute is "'an assertion of jurisdiction to the limits allowed by the Constitution...'" [citation omitted]. The court therefore inquired, first, whether § 3(g) of the Long Arm Statute authorizes jurisdiction and, if so, whether the exercise of jurisdiction is "'consistent with basic due process requirements mandated by

[3] The defense was raised under Mass.R.Dom.Rel.P. 12(b)(2), which is identical to Mass.R.Civ.P. 12(b)(2).

the United States Constitution'" [*infra* at 5a].[4] The court concluded that § 3(g) does indeed confer jurisdiction over petitioner because "it is the marital relationship in Massachusetts from 1988 to 1994 that has given rise to [respondent's] economic claims" rather than the subsequent dissolution of the marriage outside Massachusetts [*infra* at 6a]. The court then held that the exercise of jurisdiction also comports with petitioner's federal due process right. Finding that "the 'heft' of the marriage was located" in Massachusetts and that the parties lived there in marriage "for close to six years", the Appeals Court ruled that petitioner could "scarcely be surprised by, nor reasonably view as unfair", the enforcement by Massachusetts of rights "that arise from that relationship" [*infra* at 7a] [quoting *Rutledge v. Rutledge*, 26 Mass.App.Ct. 537, 529 N.E.2d 1361, 1363 (1988)]. Observing that the Long Arm Statute no longer requires that the parties' marital residence in Massachusetts "be recent", the court concluded that the Massachusetts court's "power to adjudicate ... arose as the result of a marriage with a duration principally in Massachusetts" and that this authority was not lost "merely because the parties attempted to preserve the marriage in Bahrain, then separated permanently when the marriage disintegrated." [*infra* at 7a-8a].[5]

Petitioner filed an application for discretionary further appellate review in the Supreme Judicial Court pursuant to Mass.R.App.Pro. 27.1 which, *inter alia*, challenged the Appeals Court's ruling on the due process question, but the

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[4] The court found no other basis for personal jurisdiction, and specifically rejected respondent's assertion of the separate "transacting business" provision in the Long Arm Statute, § 3(a) [*infra* at 6a n.6].

[5] The court also rejected petitioner's separate arguments that it should defer to the foreign courts on grounds of claim preclusion and comity [*infra* at 8a-11a].